(2)

No. 90-1127

Supreme Court, U.S.
FILED
MAR 14 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

JOHN G. ROBERTS, JR.
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

ROBERT S. BURK
General Counsel

HENRI F. RUSH
Deputy General Counsel

CLYDE J. HART, JR.
Attorney
Interstate Commerce Commission
Washington, D.C. 20432

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission reasonably determined that corporate subsidiaries newly formed to acquire lines of railroad were non-carriers under 49 U.S.C. 10901 because their parent companies did not exert operational control over them, and because the subsidiaries were not formed to evade labor protective obligations applicable to the parent.

2. Whether the Interstate Commerce Commission permissibly concluded that 49 U.S.C. 11347 does not require the imposition of labor protection conditions for employees of railroads that were not parties to control transactions authorized pursuant to 49 U.S.C. 11343.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	9
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Alleghany Corp. v. *Breswick & Co.*, 353 U.S. 151 (1957)	11
Black v. *ICC*, 762 F.2d 106 (D.C. Cir. 1985)	2
Brotherhood of Locomotive Engineers v. *ICC*, 909 F.2d 909 (6th Cir. 1990)	10
Burlington Northern, Inc.—Control & Merger—St. L., 360 I.C.C. 784 (1980)	13
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	8, 14
Chicago, M., St. P. & Pac. R.R., In re, 658 F.2d 1149 (7th Cir. 1981), cert. denied, 455 U.S. 1000 (1982)	2
County of Marin v. *United States*, 356 U.S. 412 (1958)	11
Crounse Corp. v. *ICC*, 781 F.2d 1176 (6th Cir.), cert. denied, 479 U.S. 890 (1986)	14
Ex parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, 1 I.C.C. 2d 810 (1985), aff'd *sub nom. Illinois Commerce Commission* v. *ICC*, 817 F.2d 145 (D.C. Cir. 1987)	2
Gilbertville Trucking Co. v. *United States*, 371 U.S. 115 (1962)	11
Guilford Transp. Indus., Inc.—Control—B&M Corp., 366 I.C.C. 292 (1982)	13
Lamoille Valley R.R. v. *ICC*, 711 F.2d 295 (D.C. Cir. 1983)	13-14

Cases—Continued: Page

Milwaukee Reorganization-Acq. by GTC, 2 I.C.C. 2d 161 (1984) 13
Missouri-K.-T. R.R. v. *United States*, 632 F.2d 392 (5th Cir. 1980), cert. denied, 451 U.S. 1017 (1981) 14
New York Dock Ry. v. *United States*, 609 F.2d 83 (2d Cir. 1979) 3
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 (1974) .. 14
NLRB v. *Food & Commercial Workers*, 484 U.S. 112 (1987) 14
Pittsburgh & Lake Erie R.R. v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2584 (1989) 2
Railway Labor Executives' Ass'n v. *ICC*, 819 F.2d 1172 (D.C. Cir. 1987) 7, 9
Railway Labor Executives' Ass'n v. *United States*, 791 F.2d 994 (2d Cir. 1986) 10
Southern P. Transp. Co. v. *ICC*, 736 F.2d 708 (D.C. Cir. 1984) 14
Sullivan v. *Everhart*, 110 S. Ct. 960 (1990) 14
United States v. *Marshall Transport Co.*, 322 U.S. 31 (1944) 11
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951) 12

Statutes and regulations:

Emergency Transportation Act of 1933, ch. 91, § 201, 48 Stat. 217 12
Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*:
49 U.S.C. 10505 ..... 2, 4
49 U.S.C. 10901 ..... 2, 4, 5, 6, 7, 8, 9, 10, 11, 12
49 U.S.C. 10901(e) 3
49 U.S.C. 11343 ..... 3, 4, 5, 6, 7, 8, 9, 10, 11, 12
49 U.S.C. 11343(a)(4) 11
49 U.S.C. 11343(a)(5) 3, 11
49 U.S.C. 11347 ..... 3, 4, 5, 6, 8, 9, 12, 13, 14, 15
Transportation Act of 1920, ch. 91, 41 Stat. 456:
§ 400, 41 Stat. 474 12
§ 406, 41 Stat. 481 12
Transportation Act of 1940, ch. 722, § 7, 54 Stat. 907 12

Statute and regulations—Continued: Page

49 U.S.C. 5(2)(f) (1976) 14, 15

49 C.F.R.:

Section 1150.1(a) 2

Section 1150.32(b) 2

Miscellaneous:

S. Rep. No. 87, 73d Cong., 1st Sess. (1933) 11

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1127

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in the *FRVR* case (Pet. App. 1a-19a) is reported at 914 F.2d 276. The order of the court of appeals in the *B&P* case (Pet. App. 52a-53a) is unreported. The decisions of the ICC in the *FRVR* case (Pet. App. 20a-34a and 35a-51a) are unreported. The ICC decision (Pet. App. 54a-83a) in the *B&P* case is unreported.

JURISDICTION

The judgments of the court of appeals were entered on September 14, 1990 and October 30, 1990 (Pet. App. 52a). On December 4, 1990, Chief Justice Rehnquist signed an order extending the time within which to file a petition for a writ of certiorari to and including January 14, 1991, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 10901 of the Interstate Commerce Act (the Act) requires that a noncarrier seeking to acquire or begin operations over any rail line must first secure the authorization of the ICC.[1] Alternatively, a noncarrier may seek an exemption from the approval process under regulations issued pursuant to 49 U.S.C. 10505. See 49 C.F.R. 1150.32(b); *Ex parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1985), aff'd *sub nom. Illinois Commerce Commission* v. *ICC (Class Exemption)*, 817 F.2d 145 (D.C. Cir. 1987) (Table). See *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2584, 2591 (1989). In a rail line acquisition approved under Section 10901 or exempted from approval under Section 10505, the ICC has discretion whether to impose labor protec-

[1] Although 49 U.S.C. 10901 refers to transactions involving "rail carrier[s]," regulations and judicial decisions have required noncarriers to comply with its provisions. See 49 C.F.R. 1150.1(a) (1987); *Black* v. *ICC*, 762 F.2d 106, 115 (D.C. Cir. 1985); *In re Chicago, M., St. P. & Pac. R.R.*, 658 F.2d 1149, 1169 (7th Cir. 1981), cert. denied, 455 U.S. 1000 (1982).

tive conditions for the benefit of employees affected by the transaction. 49 U.S.C. 10901(e).

Section 11343 requires that a rail carrier or a person that controls rail carriers must obtain the ICC's prior approval and authorization for the acquisition of control of another rail carrier. 49 U.S.C. 11343. In a transaction approved pursuant to Section 11343, the statute mandates the imposition of labor protective conditions for the benefit of employees affected by the transaction. 49 U.S.C. 11347. The conditions imposed by the ICC generally include reemployment rights, severance pay, continuation of fringe benefits, and moving allowances and displacement allowances for up to six years. See *New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979).

2. a. Itel Rail Corporation (Itel Rail), a subsidiary of Itel Corporation (Itel), controls several rail carriers. The FRVR Corporation (FRVR), a wholly owned subsidiary of Itel Rail, was formed in 1987 to purchase the "Duck Creek South" rail line from the Chicago & North Western Transportation Company (C&NW). Duck Creek South consists of about 200 miles of line and trackage rights located between Green Bay and Milwaukee, Wisconsin, which serve as feeder lines for C&NW and other railroads. Pet. App. 4a-5a. Before the acquisition, FRVR was not subject to ICC regulation. The purchase price for Duck Creek South was approximately $61 million. Itel or Itel Rail provided $14 million in the form of an equity contribution; the balance was derived from a loan secured by the acquired assets and guaranteed by Itel Rail. Pet. App. 4a-5a.

b. Because the purchase of the Duck Creek South line made FRVR a rail carrier subject to ICC regulation, Section 11343(a)(5) required Itel and Itel Rail to seek ICC approval for their right to continue to

control FRVR. Relying on Section 10505, they petitioned the ICC for an exemption from Section 11343's prior approval requirement. The ICC granted the exemption, and as required by Section 11347, imposed labor protective conditions. Pet. App. 20a.

In a petition for reopening for clarification or reconsideration of that decision, petitioner RLEA argued that Itel Rail's continued control of FRVR was inextricably linked to FRVR's acquisition of C&NW's line. Therefore, in RLEA's view, not only employees of the Itel system, but also C&NW employees, must be afforded the labor protections required by Section 11347. Pet. App. 22a. The ICC rejected that contention, finding that the only employees entitled to labor protection under Section 11347 were those of the Itel system, since those companies alone were party to the transaction at issue. The ICC also held that arguments that C&NW employees should be protected because the control transaction was inextricably tied to the acquisition transaction would be addressed in RLEA's separate petition claiming that the acquisition was invalid because FRVR was simply an alter ego used by the Itel companies to evade otherwise-applicable labor protective conditions. Pet. App. 23a-26a.

c. As a noncarrier acquiring a rail line, FRVR was required to obtain ICC approval of the purchase of the Duck Creek South line under Section 10901, unless exempted from that requirement under Section 10505. FRVR and C&NW applied for the exemption, which automatically became effective under the Commission's *Class Exemption* procedures. RLEA then challenged FRVR's use of the exemption by petitioning for revocation of the exemption. Pet. App. 5a-6a.

The ICC denied RLEA's petition. Pet. App. 35a-50a. RLEA contended that Section 10901 was not applicable to the Duck Creek transaction because, in its view, FRVR was formed primarily to avoid the imposition of labor protective provisions under Sections 11343 and 11347 and because FRVR was not sufficiently independent of Itel Rail and its other rail subsidiaries. Pet. App. 41a. Rejecting those contentions, the ICC found that FRVR operated independently of its parent and affiliated carriers and that it had not been created for the sole purpose of avoiding the labor protective provisions; FRVR's acquisition of the line was, therefore, properly considered under Section 10901. Pet. App. 6a, 45a-48a.

3. a. Buffalo & Pittsburgh Railroad (B&P) was formed to acquire and operate 369 miles of a marginal CSX Transportation, Inc. (CSXT) rail line. B&P's stock is equally divided between Genesee & Wyoming Industries, Inc. (GWI) [2] and the Arthur T. Walker Estate Corporation (Walker).[3] Each made capital contributions of $2 million to B&P in return for all of its common stock. B&P purchased the CSXT line for $28.5 million. First National Bank of Boston provided most of B&P's financing for this acquisition. Although GWI and Walker pledged their

---

[2] GWI, a holding company, controls, among other railroads, the Genesee & Wyoming Railroad Co. and the Rochester Southern Railroad, Inc. (RS). The northern end of the line acquired by B&P connects with the RS line. Pet. App. 56a-57a.

[3] Walker is wholly owned by Dumaines, a trust which controls Bangor and Aroostock Railroad Company. Walker owns all the stock of a small railroad, Pittsburgh & Shawmutt Railroad Company (P&S). The southern end of the line acquired by B&P connects with the P&S line. Pet. App. 57a.

B&P stock to the Bank, they did not guarantee any part of the loan to B&P. All the assets of B&P were pledged to the Bank as collateral. Pet. App. 54a, 56a-57a.

b. The ICC granted an exemption from Section 10901 for B&P to acquire and operate the line. Pet. App. 55a. As a result of that acquisition, a joint petition for exemption from Section 11343 was filed so as to authorize GWI, Walker, and Dumaines to continue in control of B&P once it acquired the rail line, and also to authorize the acquisition of control of two other CSXT railroads by B&P, and in turn, by GWI, Walker, and Dumaines. Pet. App. 55a. As required by Section 11347, the ICC imposed labor protective conditions to protect rail employees of the parties to the control transaction who might be adversely affected by it. Labor protective provisions were not imposed in connection with the acquisition transaction. Pet. App. 55a.

c. RLEA requested the ICC to revoke the exemptions for both the control and acquisition transactions, advancing arguments similar to those made in the *FRVR* proceedings. It contended that the Commission should ignore the independent corporate status of B&P and treat the acquisition as one made by its parent-stockholders, with the result that the acquisition would be covered by Section 11343 (and mandatory labor protections), rather than Section 10901 (and discretionary labor protections). It also contended that the labor protective conditions imposed in a control transaction that is connected to an acquisition transaction must be applied to all employees affected by the two transactions, not simply the employees of the carriers that are party to the control proceedings. Pet. App. 62a-70a.

The Commission rejected petitioners' contentions. Citing *Railway Labor Executives' Ass'n* v. *ICC*, 819 F.2d 1172, 1173 (D.C. Cir. 1987), and other cases, the ICC noted that it is not required to ignore the separate corporate forms of the parent and subsidiary, but may probe the individual facts of a case to determine whether sufficient indicia of independence exist to justify treating the subsidiary separately. Applying the factors delinated in prior cases, the ICC concluded that B&P deserved to be considered independently of its parent firms for purposes of invoking Section 10901. Pet. App. 62a-64a. The ICC also found that in light of the joint ownership of B&P by two unaffiliated firms, its separate incorporation fulfilled legitimate business needs and it was not a "sham" transaction to circumvent the requirements of Section 11343. Pet. App. 66a-67a.

In addition, relying on its decision in the *FRVR* proceedings and a consistent line of precedent, the ICC rejected RLEA's claim that labor protections in this control transaction should apply to the seller rail line's employees. It concluded that "the control transaction directly affects only employees of carriers in the commonly controlled system," and that those employees alone are entitled to receive labor protection. "The seller is not a party to the control transaction and its employees are not directly affected by it," unless they become employees of the acquiring carrier. Pet. App. 68a-69a.

4. a. Petitioners filed petitions for review of the ICC's decisions involving the FRVR transactions in the court of appeals. The court denied those petitions. Pet. App. 1a-18a. The court initially held that the ICC had permissibly declined to give labor protection to employees of C&NW in its decision approv-

ing Itel's control over FRVR. Although noting petitioners' argument that the control of FRVR by Itel and the acquisition by FRVR of a line from C&NW were "two necessary and mutually dependent steps in a single transaction," the court found that "the Commission's view that section 11347 does not require labor protection for employees of nonapplicant carriers like C&NW is firmly supported by previous decisions in this and other circuits." Pet. App. 8a-9a. Alternatively, the court concluded that the ICC's interpretation of the statute—that a carrier is "involved in a transaction" under Section 11347 only when it is formally a party to a transaction specifically covered by that provision—is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Pet. App. 10a-11a.

The court also rejected petitioners' contention that FRVR's acquisition of the Duck Creek South line should have been evaluated under Section 11343 rather than Section 10901. Based on a thorough review of the facts, the court concluded that the ICC had properly concluded that FRVR was not the alter ego of Itel as a practical matter, and that FRVR "was organized for substantial business reasons unrelated to the employee protection liabilities that would have been incurred had the purchase been made by an operational rail subsidiary." Pet. App. 11a-17a.

b. RLEA also petitioned for review of the ICC's decisions involving the B&P transactions. Citing its opinion denying the petition for review in the FRVR case, the court of appeals summarily entered judgment denying the petition for review. Pet. App. 52a-53a.

ARGUMENT

1. Petitioners' main contention (Pet. 13-22) is that in each of the ICC's decisions permitting the acquisition of rail lines by noncarriers under Section 10901, the ICC should have treated the noncarrier subsidiaries as the alter egos of their carrier holding company parents. If the ICC had done so, the transactions would have been governed by Section 11343, rather than Section 10901, and labor protections would have been mandatory for all affected employees, including those of the selling railroads under Section 11347. Because the ICC considered the acquisition transactions under Section 10901, labor protections were discretionary.

The court of appeals properly rejected petitioners' claim. Section 10901 has been construed to govern acquisitions of rail lines by noncarriers. See note 1, *supra*. In determining whether Section 10901 applies to the acquisition of a rail line by a noncarrier that is a subsidiary of a carrier holding company, the ICC engages in a fact-sensitive inquiry into (1) whether the subsidiary enjoys sufficient operational and financial independence from the carrier to qualify as a separate entity, and (2) whether it was formed solely to evade the labor protective protections of Section 11347. If a subsidiary qualifies under both prongs of that inquiry, the ICC has concluded that the purposes of Section 10901 are promoted by applying that provision to the acquisition. Pet. App. 45a.

The courts of appeals have uniformly approved the essentials of that analysis. See *Railway Labor Executives' Ass'n* v. *ICC*, 819 F.2d 1172, 1173 (D.C. Cir. 1987) ("Where * * * a subsidiary is financially independent of its parent corporation *and* is not

financially guaranteed by the parent, * * * the ICC is not *compelled* to ignore corporate formalities, but may instead decide each case on its own facts, treating related entities as separate where, in its judgment, the facts demonstrate sufficient indicia of independence."); *Railway Labor Executives' Ass'n* v. *United States*, 791 F.2d 994, 1005-1006 (2d Cir. 1986) (upholding an ICC determination under Section 10901 where the new subsidiary was not formed "to elude the otherwise applicable provisions of section 11343," but for legitimate business purposes, and the subsidiary had "indicia of independence"); *Brotherhood of Locomotive Engineers* v. *ICC*, 909 F.2d 909 (6th Cir. 1990). In reviewing the FRVR acquisition, the court of appeals concluded that that authority "amply support[s] the Commission's analysis of the independence factor," and it rejected, on the particular facts presented, petitioners' contention that "the formalities of corporate structure should have been disregarded because a substantial purpose of FRVR's creation was to evade the imposition of labor protection." Pet. App. 12a, 15a.[4]

Petitioners err in contending (Pet. 12) that the Commission must pierce the corporate veils between parent and subsidiary, and collapse two statutory proceedings into one by regulating the rail line acquisitions in this case under Section 11343. The fact

---

[4] Although the court questioned whether the ICC properly articulated the standard governing whether a subsidiary created to evade labor protections should be treated as an alter ego of its parent, the court did not reach that issue because it was satisfied that the ICC had "reasonably concluded that FRVR was organized for substantial business reasons unrelated to employee protection liabilities that would have been incurred had the purchase been made by an operating rail subsidiary." Pet. App. 17a.

that the noncarrier applicant for approval to acquire a rail line is a subsidiary of a carrier or a carrier holding company does not make Section 10901 inapplicable; rather, it simply means that the parent firm must also obtain approval for its continuation in control of the subsidiary under Section 11343 (or an exemption from application of that provision).[5] Because the ICC does apply Section 11343 to the parent's changed relationship with a subsidiary that has become a carrier, petitioners' reliance (Pet. 13-17) on *United States* v. *Marshall Transport Co.*, 322 U.S. 31, 35-36 (1944); *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151 (1957); *County of Marin* v. *United States*, 356 U.S. 412 (1958); and *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115 (1962), is misplaced. Those cases simply establish that parent-subsidiary relations cannot be used to evade ICC regulation of acquisition transactions. Here, there has been no evasion of Section 11343 because the ICC applies that provision to the control relationships created by the acquisitions. None of the cited cases suggests that even if acquisitions are not technically covered by Section 11343, they must nonetheless be treated as if they were in order to insure application

---

[5] Section 11343 recognizes the separate corporate existence of parent and subsidiary corporations by referring not only to a "carrier," but also to a "person that is not a carrier but controls any number of carriers." 49 U.S.C. 11343(a)(5). Indeed, the provisions that are now subsections (a)(4) and (a)(5) were added in 1933 precisely because the original 1920 version of the Act, covering only "carriers," did not reach corporate parents, thus allowing holding companies to be used to achieve *de facto* consolidations beyond the reach of ICC regulation. See S. Rep. No. 87, 73d Cong., 1st Sess. 3, 8-9 (1933).

of the labor protective requirements in Section 11347.[6]

In sum, while the ICC is *permitted* in an acquisition transaction to look beyond a noncarrier subsidiary's independent corporate form in order to prevent evasion of the statute's purpose, the ICC is not *required* to do so where a subsidiary was formed for bona fide business reasons and has sufficient indicia of operational and financial independence. Petitioners' claim (Pet. 18-19) that the ICC has incorrectly appraised the relevant considerations to determine whether the particular subsidiaries here were independent simply reflects a disagreement with the agency over the proper interpretation of the facts. The Commission's findings, which were upheld by the court of appeals, warrant no further review by this Court. Cf. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).[7]

---

[6] The historical evolution of the relevant provisions undermines any claim that the ICC's regulatory practice must be modified because of labor protection concerns. Congress fixed the jurisdictional boundaries of Sections 10901 and 11343 in the Transportation Act of 1920, ch. 91, §§ 400, 406, 41 Stat. 474, 481, and the Emergency Transportation Act of 1933, ch. 91, § 201, 48 Stat. 217, for purposes of regulating railroad finances, competition, services, and capacity. It made no significant change in the interplay of those provisions when it passed the Transportation Act of 1940, which added the employee protective provisions now codified in Section 11347. Ch. 722, § 7, 54 Stat. 907. There is no evidence that, in superimposing the employee protective conditions on an established regulatory framework, Congress intended to change the existing scheme solely to make the protective conditions applicable to more transactions.

[7] Petitioners contend (Pet. 26-28) that the ICC has deviated from its interpretation and application of the statute in two recent proceedings—one of which is currently pending before

2. Petitioners also contend (Pet. 22-24) that the ICC has impermissibly determined that in transactions involving the approval of control of one rail carrier by another, labor protections under 49 U.S.C. 11347 are mandated only for the employees of the parties to the transaction that is subject to ICC approval. Section 11347 states that "[w]hen a rail carrier is involved in a transaction for which approval is sought" under certain provisions of the Act, the ICC "shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction" as required under certain former provisions. 49 U.S.C. 11347. The ICC has concluded that the only rail carriers "involved" in a transaction in which a parent will control a subsidiary that has acquired a rail line are the parent and subsidiary companies—not the selling carrier. Pet. App. 24a, 69a. The ICC has "consistently rejected the argument that employee protection should be extended to employees of carriers not party to the section 11343 transaction which gave rise to mandatory protection." *Id.* at 69a, citing *Milwaukee Reorganization—Acq. by GTC*, 2 I.C.C.2d 161, 221 (1984); *Guilford Transp. Indus., Inc.—Control—B&M Corp.*, 366 I.C.C. 292, 344 (1982); and *Burlington Northern, Inc.—Control & Merger—St. L.*, 360 I.C.C. 784, 948-950 (1980).

As the court of appeals explained, Pet. App. 9a, the ICC's interpretation has been upheld by the courts of appeals in a long line of decisions. See *Lamoille*

---

the ICC. Quite apart from our disagreement with the suggestion of inconsistency, the court of appeals correctly found it irrelevant to the present case which was decided "before the ones cited by petitioners." Pet. App. 14a. There will be time enough to consider whether the agency policy articulated in those later decisions warrants this Court's review.

Valley R.R. v. *ICC*, 711 F.2d 295, 323-324 (D.C. Cir. 1983); *Southern P. Transp. Co.* v. *ICC*, 736 F.2d 708, 725 (D.C. Cir. 1984); *Missouri-K.-T. R.R.* v. *United States*, 632 F.2d 392, 410-412 (5th Cir. 1980), cert. denied, 451 U.S. 1017 (1981); *Crounse Corp.* v. *ICC*, 781 F.2d 1176, 1192-1193 (6th Cir.), cert. denied, 479 U.S. 890 (1986).[8] The statutory language requires that labor protections be applied to affected employees of carriers "involved" in the transaction subject to approval by the ICC; the natural reading of that provision is that the "involved" carriers are those that are party to the transaction that the ICC must review. But even if the provision were ambiguous, the ICC's interpretation is entitled to deference if it is rational and consistent with the statute. *Chevron*, 467 U.S. at 843-845; *NLRB* v. *Food & Commercial Workers*, 484 U.S. 112, 123 (1987); *Sullivan* v. *Everhart*, 110 S. Ct. 960, 964 (1990). The court of appeals correctly concluded that the ICC's consistent interpretation of the Act, which promotes its efficient administration and is supported by the relevant legislative history, satisfies that standard. Pet. App. 10a; see *Lamoille Valley*, 711 F.2d at 323-324.[9]

---

[8] Petitioners' contention (Pet. 22 & n.7) that these cases are inapposite because each dealt with employees of competing carriers is wide of the mark. The ICC's construction of the language of Section 11347 to cover only those carriers that are parties to the transaction being reviewed applies equally to competitor carriers and to selling carriers.

[9] Congress amended former Section 5(2)(f) of the Act in 1976 and then recodified that provision as Section 11347 in 1978 without any change with respect to the employees covered. As the court noted in *Lamoille Valley*, Congress "implicitly approved the ICC's interpretation in revising and reenacting Section 11347 in 1976." *Lamoille Valley*, 711 F.2d at 324, citing *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974) (additional deference to an agency's statutory inter-

Petitioners argue (Pet. 23-24) that the ICC's interpretation of Section 11347 is invalid because that provision is simply a recodification of former Section 5(2)(f), which referred to the employees of the "carrier or carriers" involved in a regulated transaction as being eligible for protective conditions. Consequently, petitioners contend, the singular form used in Section 11347 ("a rail carrier * * * involved in a transaction") does not support the ICC's exclusion of a selling carrier's employees. Petitioners' contention is wrong. The ICC has never stated that only one carrier's employees are eligible for labor protective conditions; the ICC's view is that only affected employees of an applicant carrier are eligible for labor protection. The language of Section 11347's predecessor is consistent with that reading.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

ROBERT S. BURK
General Counsel

HENRI F. RUSH
Deputy General Counsel

CLYDE J. HART, JR.
Attorney
Interstate Commerce Commission

MARCH 1991

---

pretation is due "where Congress has reenacted the statute without pertinent change").

* The Solicitor General is disqualified in this case.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20435